IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND HUGHES	:	
	:	CIVIL ACTION
v.	:	
	:	No. 00-3065
UNITED STATES OF AMERICA	:	

MEMORANDUM

Ludwig, J. **October 23, 2000**

Defendant United States of America moves to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Jurisdiction is federal question, 28 U.S.C. § 1331, the action having been filed under the Federal Tort Claims Act, 38 U.S.C. § 1346.

On April 15, 1997, plaintiff Raymond Hughes was admitted to the Veterans' Administration Medical Center in Charleston, South Carolina. Preparatory to a cardiac catheterization and a subsequent coronary bypass, plaintiff was given Heparin, a blood thinner – which was administered almost continuously from April 16 to April 23, 1997. From April 17 to June 4, 1997, plaintiff remained heavily sedated and unconscious, during which time, as a result of gangrene of the extremities, his right leg above the knee, left hand, right metacarpal, and left leg below the knee were amputated. When he regained consciousness he was advised by his doctors that the amputations were necessary because of an allergic reaction to Heparin. Pltf.'s mem. ex. 4. On July 23, 1997, plaintiff was discharged from the VAMC with instructions noting a diagnosis of "adverse reaction to Heparin (Heparin Allergy)." Pltf.'s mem. ex. 13.

In early February, 1999, plaintiff applied to the Veterans' Administration for benefits under 38 U.S.C. § 1151.[1] At that time, he informed the VA representative that he was not interested in suing the government but only in recovering under § 1151.[2] Pltf.'s mem. at 4. In April 1999, plaintiff consulted with an attorney regarding the possibility of a tort claim for his injuries. The attorney requested plaintiff's medical records from the VA. His follow-up letter said that since the statute of limitations would be expiring, he needed the records no later than June 11, 1999. Def.'s mem. ex. 5. Upon receipt of the records on June 10, 1999, he had them reviewed by a physician and, in July, 1999, informed plaintiff that he would not handle the case. Pltf.'s mem. ex. 15. In December, 1999 plaintiff retained new counsel and filed an administrative tort claim with the VA on December 16, 1999. Pltf.'s mem. at 5. Plaintiff's VA administrative claim was denied, and, on June 16, 2000 he filed this action.

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[1] Section 1151(a) grants benefits to veterans for disability or death as if such injuries were service-connected if the disability or death:

> "was not the result of the veteran's willful misconduct and –
>
> (1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department facility . . . and the proximate cause of the disability or death was –
>
> (A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or
>
> (B) an event not reasonably forseeable . . ."

38 U.S.C. § 1151 (c).

[2] In October, 1999, plaintiff was granted 100% disability benefits of $4,960 per month as a single veteran with no dependents. Def.'s mem. ex. 8.

Under the FTCA, the limitations period is prescribed as follows: "[A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months . . . of notice of denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). It is undisputed that plaintiff's claim was not filed with the VA within two years of the time of injury.

On August 22, 2000, defendant moved to dismiss for lack of subject matter jurisdiction asserting the expiration of the limitations period. Fed. R. Civ. P. 12(b)(1). Plaintiff countered that his claim did not accrue until he knew that the cause of his injuries may have been negligence – which did not occur until he received his medical records from the VAMC on or about June 10, 1999. Pltf.'s mem. at 10. On that basis he would have until June 10, 2001 within which to file his administrative claim.

Preliminarily, plaintiff argues that the issue is not one of jurisdiction under Rule 12(b)(1), but should be considered under Rule 12(b)(6) as an affirmative defense – and, because movant submitted information outside the pleadings, should be converted to a summary judgment motion under Rule 56. Plaintiff refers to decisions in other circuits holding the defense to be non-jurisdictional given the ruling in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).[3] There, the Court concluded "the same rebuttable

[3] E.g., Schmidt v. United States, an FTCA case that interpreted Irwin implicitly to hold "that compliance with the statute of limitations is not a jurisdictional prerequisite to suits against the government." Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1990). See also Glarner

presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Irwin, 498 U.S. at 96, 111 S.Ct. at 458. However, whether equitable tolling transforms the issue from a jurisdictional one to an affirmative defense is not material to the resolution of this case.[4]

While the tolling of statutes of limitations against the government is permissible, "federal courts have typically extended equitable relief only sparingly" and have not accepted "a garden variety claim of excusable neglect." Irwin, 498 U.S. at 95-96. Because "limitations periods should be strictly construed," Barren, 839 F.2d at 992, equitable tolling occurs only when "(1) the defendant has actively misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has timely asserted his rights mistakenly in the wrong forum." United States v. Midgely, 142 F.3d 174, 179 (3d Cir. 1998).

With regard to the FTCA statute of limitations and medical negligence, the controlling precedent is United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, the question was presented whether a "claim 'accrues' within the

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v. U.S. Department of Veterans Administration, 30 F.3d 697 (6th Cir. 1994).

[4] The law in our Circuit has not yet followed Schmidt analysis. Before Irwin, our Court of Appeals held that "the running of a statute of limitations on an action brought against the United States is a jurisdictional defect not subject to waiver." Barren v. United States, 839 F.2d 987, 992 (3d Cir. 1988). Last year, a decision in our district held that a suit instituted outside the FTCA limitations period deprived the court of subject matter jurisdiction over the claim. Forman v. United States, 1999 WL 793429 at *12 (E.D. Pa. 1999).

meaning of the [FTCA] when the plaintiff knows both the existence and cause of the injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice." Kubrick, 444 U.S. at 113. Congressional intent was construed to define accrual of a claim not in terms of when a plaintiff became aware that the injury was negligently inflicted; it accrues when plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." Id. at 122. Applying Kubrick, an FTCA claim accrues when a "plaintiff possessed the facts, such that, as a reasonable person, he should have known of the malpractice." Barren, 839 F.2d at 990.

Combining Barren and Midgely, unless an FTCA medical negligence plaintiff was actively misled by the government or prevented in some extraordinary way from asserting rights, the claim accrues when plaintiff knew of the injury and its cause and a reasonable person should have known of the malpractice.

Here, plaintiff emphasizes his reliance on his doctors' assurances that because of his previously unknown allergy, the amputations were unavoidable, and, consequently, he had no reason to believe he had a tort claim. However, this point highlights plaintiff's awareness not only of his injury but also its cause. Kubrick places an affirmative burden on a plaintiff armed with the predicate facts to obtain medical advice and pursue the claim. Kubrick, 444 U.S. 123. "The prospect is not so bleak for the plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury." Id. at 122. Barren also stresses that plaintiff's reliance on the assurances of the negligent doctors is not sufficient

if a reasonable person should have known of the malpractice – even if some further investigation was required. Barren, 839 F.2d 990-91.

Under the very unfortunate facts of this case, plaintiff's claim accrued in June-July 1997 while he was in the hospital and realized he was an amputee.[5] No doubt put off by the explanation purportedly given him, he was still on notice to make further inquiry, which he evidently did not do. Because the law mandates strict construction of the limitations statute, the belatedness of his investigation may have worked an admittedly "harsh result." Barren, 839 F.2d at 990. Nevertheless, there appears to be no basis for relief.

An order accompanies this memorandum.

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Edmund V. Ludwig, J.

[5] His sister-in-law testified at his benefits hearing that she and plaintiff's wife had noticed his fingers turning black and had called it to the attention of his nurses, who said he simply had bad circulation. Def.'s mem. ex. 7.

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ORDER

Ludwig, J. **October 23, 2000**

AND NOW, this 23rd day of October, 2000, the motion of defendant United States of America to dismiss this action for lack of subject matter jurisdiction is granted, and the action is dismissed. Fed. R. Civ. P. 12(b)(1). Plaintiff Raymond Hughes' "Motion to Compel Defendant, United States of America, to File an Answer to Plaintiff's Complaint Within Ten (10) Days" is moot.

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Edmund V. Ludwig, J.